



Federal Communications Commission
Washington, D.C. 20554

August 3, 2007

VIA USPS and E-MAIL

L. Andrew Tollin, Esq.
Craig E. Gilmore, Esq.
Wilkinson Barker Knauer, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037

W. Kenneth Ferree, Esq.
Erin L. Dozier, Esq.
Christopher G. Tygh, Esq.
Sheppard Mullen Richter & Hampton LLP
1300 I Street NW
11th Floor East
Washington, DC 20005-3314

Re: Freedom of Information Act Request (FOIA Control No. 2007-414) for records submitted
under Requests for Confidential Treatment (REF: WT Docket Nos. 07-16, 07-30)

Dear Counselors:

By this letter, we grant in part and deny in part the Freedom of Information Act request (FOIA Request) filed by AT&T Inc., on behalf of AT&T Mobility LLC and its wholly-owned and controlled wireless affiliates (AT&T), on June 20, 2007.¹ Briefly, AT&T seeks limited inspection, under a customary protective order, of two letters that M2Z Networks, Inc. (M2Z) filed under separate confidentiality requests on March 26, 2007 (the "First Confidentiality Request" and the "First Letter"), and on June 4, 2007 (the "Second Confidentiality Request" and the "Second Letter").² For the reasons discussed below, we grant in part and deny in part AT&T's FOIA Request. We also grant in part and deny in part M2Z's Second Confidential Request after first discussing our prior ruling on the First Confidentiality Request.

May 2007 Ruling. On May 23, 2007, we granted in part and denied in part M2Z's First Confidentiality Request for the First Letter that M2Z filed in the above-docketed proceedings on March 26, 2007.³ We issued the *May 2007 Ruling* in response to an earlier FOIA request⁴ and, under that ruling, a redacted version of the First Letter is now routinely available to the public.⁵ Accordingly,

¹ AT&T filed the FOIA Request on June 20, 2007, and it was received by the FOIA Control Staff on June 21, 2007. See FOIA Control No. 2007-414.

² See Letter to Marlene Dortch, Secretary, FCC, from W. Kenneth Ferree, Esq. (June 4, 2007).

³ See Letter to Marlene Dortch, Secretary, FCC, from W. Kenneth Ferree, Esq. (March 26, 2007).

⁴ See Request of NetfreeUS, LLC, FOIA Control No. 2007-258, Letter to Stephen E. Coran and W. Kenneth Ferree, Esqs., from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau (May 23, 2007) (*May 2007 Ruling*).

⁵ To preserve M2Z's appeal rights, we did not add the *May 2007 Ruling* to the dockets until July 7, 2007. As such, we recognize that the *May 2007 Ruling*, including the redacted version of the First Letter, was not available to the public when AT&T filed its FOIA Request.

today's response to AT&T's FOIA Request is framed around the Second Confidentiality Request for the Second Letter, although we recognize that AT&T's arguments related to its status as a petitioner to deny M2Z's application also apply to the First Letter.

Second Confidentiality Request. M2Z states that the Second Letter contains information relating to M2Z's financial qualifications that is relevant to the FCC's review of M2Z's application for an exclusive, nationwide license for the 2155-2175 MHz band (Application).⁶ In this connection, M2Z avers that the Second Letter contains "commercial or financial information" that is "privileged and confidential"⁷ and that public disclosure would adversely affect M2Z by alerting competitors of a potential funding source and M2Z's negotiating terms, which would also adversely impact M2Z's ability to negotiate with potential sources of additional funds.⁸ Alternatively, M2Z requests confidential treatment pursuant to Section 0.459(b) of the Commission's Rules.⁹

FOIA Request. AT&T seeks to inspect the First Letter and the Second Letter (collectively, the Letters) pursuant to the Freedom of Information Act.¹⁰ Noting M2Z's statement that the Letters bear directly on whether M2Z has the financial ability to construct and deploy its proposed network,¹¹ AT&T, which has filed a petition to deny against M2Z's application, contends that it can not provide meaningful comment on M2Z's financial ability without reviewing the Letters.¹² Moreover, AT&T states that limited disclosure is necessary to ensure fairness to the other parties in the above-docketed proceedings¹³ and that the Commission has specifically ruled that petitioners to deny have a legitimate interest in reviewing application documents that clearly have a material bearing on the resolution of the issues that the petitioners have raised.¹⁴ To protect the rights of M2Z, AT&T suggests the use of a customary protective order.¹⁵

M2Z Response. On July 9, 2007, we mailed the FOIA Request to M2Z in accordance with 47 C.F.R. § 0.461(d)(3), and M2Z responded, on July 16, 2007, that our *May 2007 Ruling* has mooted AT&T's FOIA Request relative to the First Letter and set forth the rationale for denying AT&T's FOIA Request relative to the Second Letter.¹⁶ In particular, M2Z states that the *May 2007 Ruling* held that

⁶ See Second Confidentiality Request at 1-2.

⁷ *Id.* at 2 citing 47 C.F.R. § 0.457(d)(2) and 5 U.S.C. § 552(b)(4).

⁸ *Id.* at 2.

⁹ *Id.* citing 47 C.F.R. § 0.459(b).

¹⁰ See 47 C.F.R. § 0.461, 5 U.S.C. § 552. To the extent that the FOIA Request, at 2, also sought to inspect the First Confidentiality Request itself, we note that M2Z has filed it on ECFS, in the above-docketed proceedings, thereby making it routinely available to the public.

¹¹ See FOIA Request at 3 citing M2Z [Second] Request for Confidential Treatment at 1-2.

¹² See FOIA Request at 3.

¹³ See FOIA Request at 3 quoting Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Report and Order*, 13 FCC Rcd 24816, 24828 (1998) (*Confidentiality Policy R&O*).

¹⁴ FOIA Request at 3 quoting Mobile Communications Holdings, Inc., *Disclosure Order*, 18 FCC Rcd 133, 134 (IB/SD 2003).

¹⁵ FOIA Request at 4 citing *Confidentiality Policy R&O*, 18 FCC Rcd at 24824.

¹⁶ See Letter to Marlene Dortch, Secretary, FCC, from Erin L. Dozier, Esq. (July 16, 2007), at 1 (M2Z Response).

Title III applicants, such as M2Z, "should not necessarily be required to forgo confidential information as a condition of obtaining a license."¹⁷

AT&T Reply. On July 23, 2007, AT&T replied that contrary to M2Z's claims, the *May 2007 Ruling* stated found that "limited disclosure under a 'Protective Order' to allow a party to review confidential materials pursuant to certain restrictions would be more appropriate than the unfettered public disclosure" sought by NetfreeUS in its FOIA Request.¹⁸ AT&T also reiterates that limited disclosure pursuant to a protective order would be appropriate and consistent with Commission policy and precedent and notes that M2Z makes no showing why a limited protective order would not protect its rights.¹⁹

Discussion

Section 0.457 of the Commission's Rules specifically describes materials that the Commission does not routinely make available for public inspection.²⁰ For materials not specifically listed in Section 0.457, Section 0.459 provides a mechanism by which any party submitting information to the Commission may request that the information be kept confidential.²¹ A party seeking confidential treatment under this rule is required to submit a statement of the reasons for withholding the materials from inspection and of the facts upon which those reasons are based.²² Mere conclusory or generalized allegations cannot support a request for nondisclosure.²³ Rather, Section 0.459(d) of the Commission's Rules²⁴ provides that a request for confidentiality will be granted if it presents by a preponderance of the evidence a case for nondisclosure consistent with the provisions of the Freedom of Information Act (FOIA).²⁵ To "reduce the number of unsubstantiated requests that we receive and conserve the resources of submitters by providing them with guidance as to what kind of information we require to decide a confidentiality request," Section 0.459(b) sets forth nine categories of information that a submitter may provide to substantiate requests for confidentiality.²⁶

¹⁷ See M2Z Response at 3 quoting *May 2007 Ruling* at 5, citing *Confidentiality Policy R&O*, 13 FCC Rcd at 24838-39 ¶ 34.

¹⁸ See Letter to Anthony Dale, Managing Director, FCC, from Craig E. Gilmore, Esq. (July 23, 2007) at 2-3 (AT&T Reply).

¹⁹ See *id.* at 3 citing *May 2007 Ruling* at 5 n.32.

²⁰ 47 C.F.R. § 0.457.

²¹ 47 C.F.R. § 0.459.

²² 47 C.F.R. § 0.459(b).

²³ See National Exchange Carrier Ass'n, Inc., *Memorandum Opinion and Order*, 5 FCC Rcd 7184, 7184 ¶ 3 (1990) (quoting *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976)).

²⁴ 47 C.F.R. § 0.459(d).

²⁵ 5 U.S.C. § 552. See also 47 C.F.R. § 0.459(d)(2). Once the Commission finds that an adequate showing is made under Section 0.459, the materials are afforded confidential treatment as described in Section 0.457. Section 0.459(h) states that once a confidentiality request is granted, the status of the materials is the same as that of materials listed in Section 0.457. See 47 C.F.R. § 0.459(h).

²⁶ See *Confidentiality Policy R&O*, 13 FCC Rcd at 24825 ¶ 11. These nine provisions are contained in § 0.459(b)(1)-(9) of the Commission's Rules, 47 C.F.R. § 0.459(b)(1)-(9).

Section 0.457 Analysis. Section 0.457(d) specifically lists those materials that the Commission accepts on a confidential basis and which are not routinely available for public inspection, and paragraph (d)(1)(i) lists "[f]inancial reports submitted by licensees of broadcast stations pursuant to former § 1.611 or by radio or television networks . . .". M2Z does not claim to be a broadcast station nor a radio or television network. Accordingly, we conclude that the Letter does not fall within the scope of Section 0.457(d)(1)(i). Moreover, Section 0.457(d)(2) states that "[u]nless the materials to be submitted are listed in paragraph (d)(1) of this section and the protection thereby afforded is adequate, it is important for any person who submits materials which he wishes withheld from public inspection under 5 U.S.C. 522(b)(4) to submit therewith a request for non-disclosure pursuant to § 0.459."²⁷

Section 0.459 Analysis. Even where materials are not automatically afforded confidential treatment, we will consider specific requests to withhold materials from routine public inspection. We now turn to M2Z's claim that its Second Letter should be withheld from routine public inspection under what is commonly referred to as "Exemption 4" to the FOIA.²⁸ That provision allows for the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential."²⁹ The prong of Exemption 4 that is applicable here pertains to documents that contain confidential commercial materials obtained from a person. In this context, "commercial" is to be given its ordinary meaning³⁰ and we conclude that M2Z's Second Letter satisfies this test because parts of it contain commercial or financial data that M2Z has not made public.³¹

Where a party is required to submit information to a Federal Government agency, the standard for determining if such commercial or financial information is "confidential" under Exemption 4 of FOIA is if disclosure of such information is likely to: (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.³²

Based on the preponderance of the evidence before us, we conclude that parts of the Second Letter are confidential, financial information of a kind that would customarily not be released to the public by the person from whom it was obtained. M2Z states that information in the Second Letter "is extremely sensitive, as it sets forth the identity of a potential source of funds as well as certain terms and

²⁷ 47 C.F.R. § 0.457(d)(2). See *In the Matter of TKR Cable Company of Ramapo, Memorandum Opinion and Order*, 11 FCC Red 3538 (1996) (Commission rejected the petitioner's argument that because the material in question – namely, FCC Form 393 – was similar to information routinely withheld by the Commission but was not specifically listed in Section 0.457, the submission should automatically be afforded confidential treatment).

²⁸ See 5 U.S.C. § 552(b)(4).

²⁹ *Id.*

³⁰ *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983) (*Public Citizen*).

³¹ In *Public Citizen*, the Court rejected the argument that "Exemption 4 should be confined to records that actually reveal basic commercial operations, such as sales statistics, profits and losses, and inventories, or relate to the income-producing aspects of a business," and instead found that records which were produced during ongoing clinical studies of the safety and efficacy of optical devices were "commercial" because documentation of the health and safety experience of the devices would be instrumental in gaining marketing approval for the products. 704 F.2d at 1290. Under such a broad interpretation of "commercial," we believe that information contained in M2Z's Second Letter satisfies this prong of the Exemption.

³² *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*), cert. denied, 507 U.S. 984 (1993) (*Critical Mass*); *Confidentiality Policy R&O*, 13 FCC Red at 24819.

conditions under which funds would likely be made available.”³³ M2Z explains that disclosing this information would significantly prejudice M2Z in any separate negotiations with other funding sources, and would alert other communications providers of a potential source of funds and some of the terms and conditions under negotiation, thereby prejudicing M2Z’s ability to compete.³⁴ In addition, M2Z states that it has taken steps to ensure that this information is not disclosed to the public and that the material for which non-disclosure is sought is not available to the public.³⁵ We also agree with M2Z that previous Commission interpretations of Exemption 4 – for example, the *ELLIPSO* decision – support a finding that portions of the Second Letter constitute the type of business information that may be properly withheld under FOIA.³⁶ Because we find that M2Z has demonstrated sufficiently that non-disclosure of parts of the Second Letter is consistent with the provisions of the FOIA, we conclude that there is a statutory basis for withholding parts of the Second Letter by affording confidential treatment under Section 0.459.³⁷ Therefore, although the entire letter is not subject to confidential treatment, in accordance with Section 0.461(f)(5) of the rules, we will redact those parts of the Second Letter that identify the source of the potential funding including indirect, identifying information, as well as specific funding terms; the remainder of the Second Letter will be made available for public inspection.³⁸

We acknowledge AT&T’s contention that our *May 2007 Ruling* did not rule upon the need to protect and weigh the well established rights of a petitioner to deny.³⁹ Although the Commission has concluded that most information submitted in Title III license application proceedings should be made publicly available,⁴⁰ the Commission has also found that applicants should not necessarily be required to forgo confidential information as a condition of obtaining a license.⁴¹ In the instant case, we conclude that limited disclosure under a “Protective Order” to allow a party to review confidential materials pursuant to certain restrictions would be more appropriate than the unfettered public disclosure sought in a FOIA request. However, “the standard applied in allowing restricted disclosure pursuant to a Protective Order is not relevant in the context of a FOIA request.”⁴² As we found in the *May 2007 Ruling*,

³³ See Second Confidentiality Request at 3.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See Application of Mobile Communications Holdings, Inc. for Authority to Construct the, *ELLIPSO* Elliptical Orbit Mobile Satellite System, 10 FCC Rcd. 1547, 1548 (IB 1994) (“buyers receive a clear competitive advantage if they know the prices that other buyers have been charged as a result of individual negotiations”).

³⁷ See, e.g., In the Matter of Paul D. Colford, The Daily News, On Request for Inspection of Records, FOIA Control No. 21-132, *Memorandum Opinion and Order*, 17 FCC Rcd 2073 (2002) (the documents sought “could conceivably assist a competitor in ascertaining [the proposed assignee’s newspaper’s] financial position and . . . [t]he fact that [the assignment applicants may have placed The New York Post’s financial condition in issue . . . is not dispositive of whether disclosure of the financial information is appropriate.”).

³⁸ 47 C.F.R. § 0.461(f)(5).

³⁹ See, e.g., AT&T Reply at 2 n.8 citing *Confidentiality Policy R&O*, 13 FCC Rcd at 24837 (“[P]etitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their applications.”).

⁴⁰ *Confidential Information Policy Order*, 13 FCC Rcd at 24838-39 ¶ 34.

⁴¹ See *id.* (where appropriate, the Commission will issue protective orders).

⁴² In the Matter of Freedom of Information Act Request for Satellite Construction Contract filed by Pegasus Development Corporation, Pegasus Development Corporation and Pegasus Development Corporation 107 Request for Confidential Treatment, FOIA Control No. 2005-512, *Order*, 20 FCC Rcd 14670, 14673 ¶ 6 (IB 2005).

the issue of confidentiality should be treated differently with respect to the above-docketed adjudicatory proceedings and requests made under the FOIA. Thus, while a protective order may be appropriate in the context of the adjudicatory proceeding,⁴³ disclosure under a FOIA request is equivalent to disclosure to the public, and a protective order is therefore inappropriate in the context of a FOIA request. This is implied by the principle that for purposes of the FOIA, any member of the public has as much right to disclosure of a record as a person with a special interest in the record requested.⁴⁴ Accordingly, the issue of limited disclosure under a protective order should be reserved for the adjudicatory proceeding. In this connection, we note that our ruling today on FOIA Control No. 2007-414 is without prejudice to the outcome of, *inter alia*, AT&T's Response,⁴⁵ M2Z's Motion to Strike, AT&T's Opposition to Motion to Strike, and/or any decision regarding the use of a protective order in the above-docketed proceedings.

We note that M2Z requested that the Commission return the Second Letter if the Second Confidentiality Request is denied.⁴⁶ Given that we are denying the Second Confidentiality Request in part, we note that Section 0.459(e) provides that "no materials submitted with a request for confidentiality will be returned if a request for inspection is filed under § 0.461."⁴⁷

Because AT&T is a commercial FOIA requestor, it is responsible for payment of the fee.⁴⁸ Based upon the Commission's fee schedule, AT&T is responsible to reimburse the Government for the cost of processing this FOIA request, which is \$17.52. The fee consists of \$17.52 for 15 minutes of a GS 15 (\$70.07/hour) search and review time.⁴⁹ AT&T will be billed by, and fees shall be paid to:

Financial Management Division
Office of Managing Director
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ordering Clauses

IT IS ORDERED that the Request for Confidentiality submitted by M2Z Networks, Inc., on June 4, 2007, is GRANTED, in part, and DENIED, in part to the extent provided herein. Accordingly, we will submit a redacted copy of the Second Letter for inclusion in the public file (WT Docket Nos. 07-16 and 07-30). Submission of the redacted version of the Second Letter to the Commission's public file (ECFS) as indicated herein will not be carried out until the time period within which to file an application for review has expired or M2Z's application for review has been fully and finally resolved by the Commission (or any appropriate court of competent jurisdiction), whichever occurs later. Under

⁴³ See *Confidentiality Policy R&O*, 13 FCC Rcd at 24831-33 ¶¶ 21-24. (adoption of model protective order).

⁴⁴ See *U.S. Dep't of Defense v. FLRA*, 510 U.S. 487, 496 (1994).

⁴⁵ See Response of AT&T Inc. to Request for Confidential Treatment, filed in the above-docketed proceedings on June 20, 2007.

⁴⁶ See Second Confidentiality Request at 4 citing 47 C.F.R. § 0.459(e) (if the materials are submitted voluntarily, *i.e.*, absent any direction by the Commission, the submitter may request return of the material without consideration if the request for confidentiality should be denied).

⁴⁷ 47 C.F.R. § 0.459(e).

⁴⁸ See 47 C.F.R. § 0.470(a)(1).

⁴⁹ See 47 C.F.R. § 0.467(a)(1).

L. Andrew Tollin, Esq.
W. Kenneth Ferree, Esq.

7.

Section 0.461(i) of the Commission's Rules, 47 C.F.R. § 0.461(i), M2Z may file an application for review of the Bureau's partial denial of M2Z's Second Confidentiality Request. Such an application for review must be filed with the Office of General Counsel within 10 working days from the date of the instant Letter. We are enclosing a copy of our redacted version of the Second Letter with our letter today to M2Z.

IT IS FURTHER ORDERED that AT&T Inc.'s Freedom of Information Act request, FILE NO. 2007-414, is GRANTED, in part, and DENIED, in part, to the extent provided herein. Under Section 0.461(i), AT&T may file an application for review of the Bureau's handling of the FOIA Request. Such an application for review must be filed with the Office of General Counsel within 10 working days from the date of the instant Letter. If M2Z does not seek review of the denial in part of its Second Confidentiality Request, the redacted Second Letter will be released to AT&T. The undersigned official is responsible for this response.

This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION



Joel D. Taubenblatt
Chief, Broadband Division
Wireless Telecommunications Bureau

Enclosure to M2Z: redacted Second Letter

Copy to: Office of General Counsel, FCC

[REDACTED]

[REDACTED]

PRIVATE AND CONFIDENTIAL

M2Z Networks, Inc.
2800 Sand Hill Road
Suite 150
Menlo Park, CA 94025-7055

Attention: Mr. Milo Medin, Chairman of the Board
Mr. John Muleta, CEO

RE: Non-Binding Letter of Intent to Support the Build-out of M2Z's
Nationwide Broadband Wireless Access Network

Dear Milo and John:

[REDACTED] is a manager of private investment funds with over [REDACTED] of gross assets under management. Our purpose is to preserve and grow our investors' capital by investing across a wide range of industries in the US and international markets. In addition to our investment in public equities markets, we also invest in other investment categories such as private equity and venture capital, with a particular focus on [REDACTED] where the United States is renowned for its intellectual and investment leadership. [REDACTED] investment style requires in-depth, fundamental research into every current and potential investment in our portfolio and is led by a team of seasoned portfolio managers who have extensive experience and contacts that allow them to have insight about the future shape of the markets and the companies that will be leaders.

We understand that M2Z Networks, Inc ("M2Z") intends to build-out a nationwide terrestrial wireless broadband access network that will provide advertising supported free broadband service to consumers as well as a wholesale broadband offering to other competitive carriers and Internet service providers. M2Z plans on using 20 MHz of unpaired spectrum block in the 2155-2175 band and is currently seeking a license from the Federal Communications Commission ("FCC") to operate. Based on our discussions and subsequent technical and financial due diligence that we have independently conducted using internal and outside experts, [REDACTED] hereby confirms its non-binding intent to serve as [REDACTED] in an offering of up to [REDACTED] in various [REDACTED] in order to help finance the build-out of its network and its operating plan. Our interest is conditioned on a number of considerations including (1) satisfactory completion of all conditions precedent including obtaining from the FCC an exclusive nationwide license to operate in the 2155-2175 MHz band on terms and conditions that are substantially similar in form as described in the M2Z Application of

[REDACTED]

May 5, 2006; (2) satisfactory completion of our continued due diligence as required by market conditions and the nature of the license granted by the FCC; (3) all necessary financial, corporate, and governmental approvals; and, (4) the absence of any material adverse change in the conditions resulting from operations, markets, and regulatory or statutory conditions. This letter is not intended to be, and shall not constitute a binding commitment by [REDACTED] and its potential co-investors and it is our mutual understanding that our indicated interest shall not be relied on by the company, its existing investors or any other parties prior to our reaching a definitive agreement with M2Z and any other parties that are necessary to such an agreement. Furthermore, this letter is not to be distributed or disclosed to, or otherwise relied upon by, any other person without [REDACTED] prior consent; provided, however, M2Z may disclose this letter to the FCC subject to appropriate confidentiality provisions in connection with your proposed application for spectrum to provide the services outlined in M2Z's business plan.

Our interest in M2Z is driven by our desire to encourage innovative new businesses to flourish in the broadband markets and improve our country's competitiveness in the global marketplace. Based on the extensive record compiled by the FCC regarding M2Z's license application, we believe that M2Z's quick entry into the marketplace will be in the public interest and create the dynamics for technological and marketplace innovation across all broadband related sectors. We therefore believe that [REDACTED]
[REDACTED]

We look forward to working with your team and your investors.

Sincerely,
[REDACTED]
[REDACTED]
[REDACTED]